

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFERY CURTIS MARBLE,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

Case No. C15-142-RSL-JPD

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a state prisoner who is currently confined at the Stafford Creek Corrections Center in Aberdeen, Washington. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from a 2010 Snohomish County Superior Court judgment and sentence.¹ Respondent has filed an answer to the petition and has submitted relevant portions of the state court record. Petitioner has filed a response to respondent's answer.

¹ Petitioner's original habeas petition (Dkt. 8) was deemed defective because petitioner failed to sign the petition and he failed to name a proper respondent. This Court therefore declined to serve petitioner's original petition, but granted him leave to amend. (*See* Dkt.7.) Petitioner filed an amended petition correcting the noted deficiencies in April 2015 (Dkt. 9), but he did not identify in his amended petition any grounds for relief. Instead, petitioner referred the Court back to the memorandum of points and authorities petitioner submitted with his original petition in which he set forth his grounds for relief and his arguments in support thereof. (*See* Dkt. 8, Memorandum

1 The Court, having carefully reviewed petitioner's petition, the briefs of the parties and
 2 the balance of the record, concludes that petitioner's amended petition for writ of habeas corpus
 3 should be denied and this action should be dismissed with prejudice.

4 FACTUAL BACKGROUND

5 The Washington Court of Appeals, on direct appeal, summarized the facts underlying
 6 petitioner's conviction as follows:

7 In 2009, Jeffery Marble lived in Everett with his wife, Catherine Dunne-
 8 Marble, and their son, Gavin.² On Friday, May 29, a man came to their house and
 9 told them the house was in foreclosure and would be sold at auction. Surprised by
 this news, Catherine asked Jeffery about it. He told her there was a mistake and
 the house was not in foreclosure.³

10 On Monday, June 1, Gavin left for school around 6 a.m. Catherine felt too
 11 ill to go to work, but around 8 or 9 a.m. she decided to go to the bank to ask about
 the mortgage. She told Jeffery where she was going and he became "slightly
 12 agitated." Catherine started down the stairs to the carport and twice felt a hand
 push her. She asked Jeffery what he was doing, and he said he was not doing
 anything.⁴ She continued down a few more steps and Jeffery grabbed her back,
 13 saying they were not going to the bank until they "had sorted this issue out about
 [Catherine] saying that he pushed [her] down the stairs." Report of Proceedings
 14 (RP) (Aug. 23, 2010) at 51.

15 Catherine testified that Jeffery knocked a cordless phone and a cell phone
 out of her hand as she attempted to call 911. She then felt a blow to her head,
 16 followed by more blows. She estimated the first blow occurred around 10 or 11
 a.m. She realized Jeffery was hitting her with a barbell.

17 Catherine tried to run out the front door. Jeffery blocked the door and
 18 dragged her back. Catherine testified that Jeffery continued to attack her. He hit
 her with the barbell 30 to 40 times, pinned her down and bashed her head on the
 19

20 of Points and Authorities.) Thus, while petitioner's amended petition is technically the operative petition in this
 matter, reference to petitioner's original materials is necessary in order to understand the substance of his claims.

21 ² [Court of Appeals footnote 1] For clarity, we use the parties' first names. Jeffery and Catherine are now
 divorced.

22 ³ [Court of Appeals footnote 2] The couple had previously argued over finances.

23 ⁴ [Court of Appeals footnote 3] Jeffery denied pushing Catherine. During the interview with Detective
 Timothy O'Hara, he claimed he grabbed her to keep her from falling.

1 floor, and pushed her against iron railings in the hallway. Catherine said the
2 attack was not continuous and Jeffery stopped hitting her at times due to
3 exhaustion. She also testified that Jeffery hit himself in the head four or five
4 times.

5 After a while, Catherine escaped to the bathroom, where the attack
6 continued. Jeffery let her go for "a second" and she tried to escape through the
7 bathroom window. He pulled her back and resumed hitting her with the barbell.
8 Catherine testified Jeffery "would kind of like collapse in front of the bathroom
9 door so [she] couldn't get out, then he would get back up again and start striking .
10 . . [a]s soon as [she] made an attempt to get to the door." RP (Aug. 23, 2010) at
11 59. She yelled for help and used her car keys to set off her car alarm, but no one
12 responded.⁵

13 Gavin returned home between 4:30 and 5:00 p.m. He heard Catherine
14 yelling for help and saw blood in the house. Gavin went to the bathroom and
15 found Jeffery pinning Catherine against the bathroom wall. Gavin saw a barbell
16 on the bathroom counter. Gavin lifted Jeffery off Catherine. Catherine ran out of
17 the house, and Gavin followed her and called 911.

18 Catherine went to the emergency room after the attack. Forensic nurse
19 Paula Skomski examined her. Catherine was bloodied and her face, head, neck,
20 torso, and limbs were bruised, cut, and swollen. A piece of metal was removed
21 from her eyelid. Skomski said Catherine's injuries were consistent with the
22 incident she described.

23 Detective Timothy O'Hara searched the house on June 1. He saw blood
on the floor, walls, stairs, and stair railings. He also found guns on the floor in
Jeffery's office and a note signed by Jeffery stating that he was responsible for all
financial debt incurred during his marriage to Catherine. On June 3, O'Hara
interviewed Jeffery in the hospital. During the interview, Jeffery said he had
blacked out during the incident and could not remember what happened. Jeffery
also said he "couldn't believe what he had done to Catherine." He admitted
having financial troubles and said "he pretty much sheltered Catherine from that,
and she didn't know anything about it." RP (Aug. 24, 2010) at 208.

Catherine later discovered that the mortgage had not been paid in over a
year, the house was in foreclosure, the car note had not been paid, and some
household bills had not been paid for several months. She testified she had only
seen "intermittent bills" for a year or more prior to the June 1 incident. After the
incident, while cleaning out the garage, she found several large garbage bags

⁵ [Court of Appeals footnote 4] Karen White, a responding police officer, testified that she walked through the house and found car keys on the bathroom counter. White also testified that an unidentified neighbor told her about hearing the car alarm going off repeatedly on the day of the attack.

1 filled with bills and other mail. She also found checks endorsed and cashed in her
2 name, but she knew nothing about the checks and the handwriting on them was
not hers.

3 The State charged Jeffery with first degree assault and unlawful
4 imprisonment, each with a deadly weapon enhancement. A jury convicted him as
charged. At sentencing, the court counted the two crimes as current offenses and
5 scored them against each other, yielding an offender score of 1 for each crime.
This resulted in a standard sentence range of 102 to 136 months for the first
6 degree assault and 3 to 8 months for the unlawful imprisonment (served
concurrently). The weapon enhancements added 24 months to the assault and 6
7 months to the unlawful imprisonment (served consecutively). Thus, the total
range, including weapon enhancements, was 132 to 166 months. Defense counsel
8 agreed with the above calculation and requested a sentence at the low end of the
range. The court imposed a mid-range sentence of 124 months for the assault,
9 with a concurrent sentence of 8 months for the unlawful imprisonment. Adding
the weapon enhancements (30 months) resulted in a total sentence of 154 months.

10 (Dkt. 17, Ex. 2 at 1-5.)

11 PROCEDURAL BACKGROUND

12 Petitioner appealed his judgment and sentence to the Washington Court of Appeals and,
13 on March 5, 2012, the Court of Appeals issued an unpublished opinion affirming the judgment
14 and sentence. (*See id.*, Exs. 2, 3, 4, 5, and 6.) Petitioner did not seek review of the Court of
15 Appeals' decision, and the Court of Appeals issued its mandate terminating direct review on May
16 18, 2012. (*Id.*, Ex. 7.) On October 11, 2013, petitioner filed a motion to recall the mandate in
17 his direct appeal, and that motion was denied on December 13, 2013. (*Id.*, Exs. 8 and 11.)

18 On May 7, 2013, petitioner filed a personal restraint petition in the Washington Supreme
19 Court. (*See id.*, Exs. 12, 13, 14, 15, and 16.) The Supreme Court Commissioner issued a ruling
20 denying petitioner's personal restraint petition on December 20, 2013. (*Id.*, Ex. 17.) Petitioner
21 thereafter filed a motion to modify the Commissioner's ruling, and that motion was denied on
22 April 2, 2014. (*Id.*, Ex. 19.) The Supreme Court issued a certificate of finality in petitioner's
23 personal restraint proceedings on April 9, 2014. (*Id.*, Ex. 20.)

1 "unreasonable application" clause, a federal habeas court may grant the writ only if the state
2 court identifies the correct governing legal principle from the Supreme Court's decisions, but
3 unreasonably applies that principle to the facts of the prisoner's case. *See Williams*, 529 U.S. at
4 407-09.

5 The Supreme Court has made clear that a state court's decision may be overturned only if
6 the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003). The
7 Supreme Court has further explained that "[a] state court's determination that a claim lacks merit
8 precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of
9 the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (citing *Yarborough*
10 *v. Alvarado*, 541 U.S. 652, 664 (2004)).

11 Clearly established federal law, for purposes of AEDPA, means "the governing legal
12 principle or principles set forth by the Supreme Court at the time the state court render[ed] its
13 decision." *Lockyer*, 538 U.S. at 71-72. "If no Supreme Court precedent creates clearly
14 established federal law relating to the legal issue the habeas petitioner raised in state court, the
15 state court's decision cannot be contrary to or an unreasonable application of clearly established
16 federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d
17 480, 485-86 (9th Cir. 2000)). If a habeas petitioner challenges the determination of a factual
18 issue by a state court, such determination shall be presumed correct, and the applicant has the
19 burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C.
20 § 2254(e)(1).

21 Speedy Trial

22 Petitioner asserts in his first ground for federal habeas relief that the trial court violated
23 his right to a speedy trial when it granted continuances on May 28, 2010 and July 2, 2010 which

1 did not further the ends of justice. (*See* Dkt. 8, Memorandum of Points and Authorities at 6.)

2 The Sixth Amendment guarantees an accused the right to a “speedy and public trial.”
3 U.S. Const Amend. VI. This right is imposed on the states by the Due Process Clause of the
4 Fourteenth Amendment. *Klopper v. North Carolina*, 386 U.S. 213 (1967). The United States
5 Supreme Court has long held that “[t]he right of a speedy trial is necessarily relative. It is
6 consistent with delays and depends upon circumstances.” *Beavers v. Haubert*, 198 U.S. 77, 87
7 (1905). Thus, “inquiry into a speedy trial claim necessitates a functional analysis of the right in
8 the particular context of the case.” *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

9 In *Barker*, the Supreme Court identified four factors that should be considered when
10 evaluating speedy trial claims. Those four factors are: (1) the length of the delay; (2) the reason
11 for the delay; (3) the defendant’s assertion of his right to a speedy trial, and (4) the prejudice to
12 the defendant. These four factors are related and must be considered together with other
13 circumstances relevant to a particular case. *Barker*, 407 U.S. at 533.

14 The Washington Court of Appeals, on direct appeal, identified the relevant factors that
15 must be balanced to determine whether a defendant's constitutional speedy trial rights have been
16 violated, and then concluded as follows:

17 Considering the totality of the circumstances, we find no constitutional speedy
18 trial violation. The record indicates several early defense requests to continue
19 granted by the court to evaluate Jeffery's mental status. Jeffery specifically
20 contests the trial court's grant of two later continuances, both of which his counsel
21 requested but he opposed. The trial court had legitimate reasons for granting each
22 continuance. It balanced the competing interests of accommodating trial
23 preparation, scheduling concerns, and securing Jeffery's constitutional rights. It
stated explicitly that it granted the continuances over Jeffery's objection to ensure
defense counsel had an adequate opportunity to prepare for trial. We conclude
Jeffery suffered no violation of his constitutional right to a speedy trial.

(Dkt. 17, Ex. 2 at 16.)

1 Petitioner fails to demonstrate that this decision of the Court of Appeals was objectively
2 unreasonable. The record before this Court reflects that charges were filed against petitioner on
3 June 26, 2009, and he was arraigned on June 29, 2009. (Dkt. 17, Ex. 23.) Petitioner's trial was
4 initially set for August 14, 2009. (*Id.*, Ex. 14 at Ex. 3.) The trial court thereafter granted eight
5 continuances and petitioner eventually proceeded to trial on August 23, 2010. (*See id.*, Ex. 14 at
6 Exs. 4-11.) Six of the eight continuances were agreed, and some of those were apparently
7 requested by defense counsel in order to have petitioner's mental status evaluated. (*See id.*, Ex. 2
8 at 16, Ex. 14 at Exs. 4-9 and Ex. 21 at 4.) The final two continuances, those which petitioner
9 complains of in this action, were requested by defense counsel for the purpose of obtaining
10 additional discovery and conducting defense interviews in preparation for trial. (*See id.*, Ex. 14
11 at Exs. 10 and 11.) The trial court granted the continuances over petitioner's objection. (*See id.*,
12 Exs. 21 and 22.)

13 While the overall delay in petitioner's case, a total of about fourteen months, was
14 somewhat lengthy, the portion of the delay which petitioner complains of was just over 70 days.⁶
15 This portion of the delay was attributable to defense counsel's need to prepare for trial and to the
16 fact that both the prosecutor and defense counsel were waiting for information from the FBI
17 which was conducting its own investigation into the case. (*See* Dkt. 17, Exs. 21 and 22.) The
18 FBI was at that point in possession of petitioner's computer and was conducting a search of
19 petitioner's hard drive. (*See id.*, Ex. 21 at 4 and Ex. 22 at 9.) The prosecutor anticipated that the
20 evidence received from the FBI would result in amendment of the charges against petitioner to
21 add another assault charge. (*Id.*, Ex. 21 at 1-2 and Ex. 22 at 8-11.)

22 ⁶ Petitioner agreed to continuances through June 11, 2010, and objected to the remaining two continuances
23 which extended the trial date first to August 6, 2010, and then to August 20, 2010. (*See* Dkt. 17, Ex. 14 at Exs. 4-
11.) As noted above, petitioner proceeded to trial on August 23, 2010, 73 days after the final agreed trial date.

1 Once the information was received from the FBI the first week of July 2010, the state
2 decided not to amend the charges but defense counsel, who reasonably held off conducting
3 witness interviews while awaiting the information from the FBI, then required additional time to
4 conduct those interviews and prepare for trial. (*See* Dkt. 17, Ex. 22.) While petitioner objected
5 to these additional delays, they were necessary in order to ensure that his counsel was adequately
6 prepared to defend him at trial. Failure to grant these continuances would likely have implicated
7 other constitutional concerns.

8 Finally, petitioner makes absolutely no showing that he was prejudiced by the delays he
9 complains of. And, absent proof of particularized prejudice, a petitioner must show that an
10 excessive delay in the proceedings was attributable to government bad faith or negligence. *See*
11 *Doggett v. United States*, 505 U.S. 647, 656-58 (1992). Petitioner makes no such showing here.
12 The state courts reasonably concluded that petitioner had established no violation of his
13 constitutional right to a speedy trial and, thus, petitioner's federal habeas petition should be
14 denied with respect to that claim.

15 Issuance of Mandate

16 Petitioner asserts as a part of his second ground for relief that the mandate in his case was
17 filed and finalized in violation of due process. (Dkt. 8, Memorandum of Points and Authorities
18 at 14-15.) Petitioner's explanation of this claim in his federal habeas materials is brief and
19 somewhat unclear. (*See id.*) However, a review of the state court record clarifies that this issue
20 relates to motions filed by petitioner after the Court of Appeals issued its decision on direct
21 appeal which petitioner believes were decided without a fair hearing.

22 The record reflects that after the Court of Appeals issued its decision on petitioner's direct
23 appeal, petitioner filed *pro se* motions in the Court of Appeals seeking new counsel and

1 additional time to file a motion for reconsideration. (*See* Dkt. 17, Ex. 8.) The state filed a
2 response to those motions, but did not serve a copy of the response on petitioner, apparently
3 because petitioner was still represented by counsel at that time. (*See id.*, Exs. 8 and 9.)
4 Petitioner's motions were subsequently denied, without him having had an opportunity to
5 respond to the state's arguments, and issuance of the mandate followed just over a month later.
6 (*See id.*, Exs. 7 and 8.)

7 Almost 17 months after the mandate issued, petitioner filed in the Court of Appeals a
8 motion to recall the mandate pursuant to Washington Rule of Appellate Procedure (RAP)
9 12.9(b). (Dkt. 17, Ex. 8.) RAP 12.9(b) provides that the appellate court may recall a mandate
10 "to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or
11 counsel in the appellate court." Petitioner argued in his motion to recall the mandate that he had
12 been denied the opportunity to respond to the state's arguments in opposition to his motions for
13 new counsel and for additional time to file a motion for reconsideration, and that this constituted
14 a violation of his due process rights warranting recall of the mandate. (*Id.*) The state filed a
15 response to petitioner's motion to recall the mandate, and petitioner filed a reply brief in support
16 of his motion. (*Id.*, Exs. 9 and 10.) The Court of Appeals, after considering all briefing of the
17 parties, denied the motion to recall the mandate under RAP 12.9. (*Id.*, Ex. 11.)

18 Respondent argues in these proceedings that petitioner's claim regarding issuance of the
19 mandate is not cognizable in this federal habeas proceeding. Respondent is correct. A writ of
20 habeas corpus may issue only upon a finding that a prisoner is "in custody in violation of the
21 Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Federal habeas
22 relief does not lie for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)(citing *Pulley*
23 *v. Harris*, 465 U.S. 37, 41 (1984)). The United States Supreme Court has made clear that it is

1 not the province of federal habeas courts to re-examine state court conclusions regarding matters
2 of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The concern of the federal court in
3 conducting habeas review is deciding whether a petitioner has suffered a violation of his federal
4 constitutional rights. *See id.*

5 The timing of the issuance of the mandate by the Washington Court of Appeals is a
6 matter of state law. The Court of Appeals' determination that petitioner was not entitled to recall
7 of the mandate under the provisions of RAP 12.9(b) was likewise a matter of state law.
8 Accordingly, petitioner's claim regarding issuance of the mandate is not subject to review in this
9 federal habeas proceeding.

10 Excessive Bail

11 Petitioner also asserts as a part of his second ground for relief that the pretrial bail
12 amounts established by the trial court were excessively high and violated his rights under the
13 Eighth and Fourteenth Amendments. (Dkt. 8, Memorandum of Points and Authorities at 20-24.)
14 Respondent argues that this claim is moot. He is correct.

15 In general, a case becomes moot when a party lacks a "legally cognizable interest in the
16 outcome." *United State Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell*
17 *v. McCormack*, 395 U.S. 486, 496 (1969)). In *Murphy v. Hunt*, 455 U.S. 478 (1982), the
18 Supreme Court concluded that under this general rule, a constitutional claim to pretrial bail
19 becomes moot once a defendant is convicted. *Id.* at 481-82. The Court explained that such a
20 question is no longer "live" following conviction because even a favorable decision on the claim
21 would not entitle the defendant to bail. *See Murphy*, 455 U.S. at 481-82.

22 There is no question that petitioner was convicted on the charges for which the pretrial
23 bail amounts at issue were established, nor is there any question that petitioner is currently

1 serving the sentence imposed as a result of that conviction. Petitioner's claim regarding his
2 pretrial bail amounts is therefore moot.

3 Prosecutorial Misconduct

4 Finally, petitioner includes in his second ground for relief claims alleging prosecutorial
5 misconduct. Specifically, petitioner claims that prosecutorial mismanagement caused delays in
6 his case and that the prosecutor committed misconduct during closing argument. (*See* Dkt. 8,
7 Memorandum of Points and Authorities at 15-20.)

8 When a prosecutor's conduct is placed into question, unless the conduct impermissibly
9 infringes on a specific constitutional right, the standard of review is the "narrow one of due
10 process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168,
11 181-82 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974). To obtain relief on a
12 claim of prosecutorial misconduct, a federal habeas petitioner must do more than show that "the
13 prosecutor's remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at
14 180-81. A petitioner must demonstrate that the allegedly improper comments made by the
15 prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of
16 due process." *Id.* at 181 (quoting *Donnelly*, 416 U.S. at 643).

17 In order to assess a claim that a prosecutor's comments rendered a trial so fundamentally
18 unfair as to deny a petitioner due process, it is necessary to examine the entire proceedings and
19 place the prosecutor's statements in context. *See Greer v. Miller*, 483 U.S. 756, 765-66 (1987).
20 A reviewing court must keep in mind that during closing argument a prosecutor has wide latitude
21 to make reasonable inferences based on the evidence. *United States v. Molina*, 934 F.2d 1440,
22 1445 (9th Cir. 1991).

Prosecutorial misconduct which rises to the level of a constitutional violation nonetheless provides a basis for federal habeas relief only if the misconduct is deemed prejudicial under the test announced by the Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir. 2004). Under *Brecht*, habeas relief may be granted only if an error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

I. Delay Attributable to Prosecutor

Petitioner asserts that the prosecutor concealed from the court facts relevant to its decisions regarding the granting of continuances. Petitioner complains that the prosecutor represented to the court at the May 28, 2010 hearing on defense counsel's request for a continuance that it would be amending the charges to add deadly weapon enhancements to the first degree assault and unlawful imprisonment charges set forth in the original information when, in fact, the original charging document already included the deadly weapon enhancements. (*See* Dkt. 8, Memorandum of Points and Authorities at 15-16.)

Petitioner also complains that the prosecutor failed to inform the court at either the May 28, 2010 hearing, or the July 2, 2010 hearing on defense counsel's final request for a continuance, that another assault charge which the prosecution anticipated adding to the case by way of an amended information was not related to the existing charges, or that additional potential evidence taken from petitioner's computer, and used to justify the continuances which petitioner objected to, was not related to the charges on which he was originally arraigned. (*See id.* at 16-17.)

The Washington Court of Appeals, on direct appeal, rejected petitioner's claim that the prosecutor mismanaged the case relative to the proposed amendment of charges and the delays

1 attributable thereto. (Dkt. 17, Ex. 2 at 16-17 n.12.) Petitioner fails to demonstrate that this
2 decision of the Court of Appeals was objectively unreasonable.

3 To the extent petitioner complains that the prosecutor falsely represented to the court that
4 the charges against him would be amended to add deadly weapon enhancements, petitioner
5 shows no prejudice whatsoever. While the record confirms that the deadly weapon
6 enhancements were included in the original charging document, the prosecutor's representation
7 that such an amendment would be forthcoming, whether or not it was intended to mislead the
8 court, did not contribute to any delay in the proceedings.

9 To the extent petitioner complains that the prosecutor failed to inform the court that the
10 proposed new assault charge and the potential evidence from his computer were not related to
11 the existing charges, he is largely incorrect. At the July 2, 2010 hearing on the final motion for
12 continuance, the trial court queried the prosecutor on the relationship between the original
13 charges and the proposed new charge. (*See* Dkt. 17, Ex. 22.) The prosecutor explained that the
14 state had been anticipating adding a new assault charge based on evidence obtained from the FBI
15 that petitioner had been poisoning his wife with Ricin and/or other materials found in their home.
16 (*Id.*, Ex. 22 at 9.) The prosecutor further explained that there was a potential theory of the case
17 that the originally charged assault was the culmination of a year-and-a-half long effort by
18 petitioner to kill his wife. (*Id.*, Ex. 22 at 10.)

19 Thus, the record makes clear that the trial court had the information at the July 2 hearing
20 which petitioner believes was necessary for it to make a fully informed decision on the final
21 motion for continuance. While this same information was not provided to the Court at the May
22 28, 2010 hearing, the record makes clear that the potential amendment of the charges was not the
23 only factor driving the request for a continuance at that time. Petitioner's counsel explained to

1 the court at that hearing that he had been preparing for a murder trial for another client for the
2 preceding three weeks and that he had had to put his preparation for petitioner's case on hold
3 during that period of time. (*See* Dkt. 17, Ex. 21 at 2.) Defense counsel further explained that he
4 still had a number of people to interview in petitioner's case and evidence that he had to review.
5 (*See id.*) Delays requested by, and attributable to, the defense cannot be charged to the state. *See*
6 *Vermont v. Brillon*, 556 U.S. 81, 92-93 (2009).

7 There is simply no evidence in the record that prosecutorial mismanagement caused
8 excessive delays or denied petitioner a fair trial. Accordingly, petitioner's federal habeas petition
9 should be denied with respect to this portion of petitioner's prosecutorial misconduct claim.

10 **2. Closing Argument**

11 Petitioner asserts that the prosecutor misrepresented the evidence in her closing
12 argument. Specifically, petitioner complains about the prosecutor's argument that petitioner
13 removed his fanny pack during his assault on his wife and that no blood was found on the fanny
14 pack, and the prosecutor's multiple references to petitioner's guns. (Dkt. 8, Memorandum of
15 Points and Authorities at 17-20.)

16 The Washington Court of Appeals rejected petitioner's challenge to the prosecutor's
17 closing argument on direct appeal, concluding that the challenged comments "expressed
18 reasonable inferences from evidence presented at trial." (Dkt. 17, Ex. 2 at 14.) Petitioner fails to
19 demonstrate that this decision of the Court of Appeals was objectively unreasonable.

20 a. Fanny Pack

21 Petitioner claims that the prosecutor's argument suggested that petitioner wore the fanny
22 pack before the incident whereas the testimony at trial indicated that petitioner was wearing the
23 fanny pack during the incident. (Dkt. 8, Memorandum of Points and Authorities at 17.)

1 Petitioner contends that the prosecutor's comment was not only false, but she used that falsehood
2 to support an argument for intent, the element which differentiates first degree assault from
3 second degree assault. (Dkt. 8, Memorandum of Points and Authorities at 18.) Petitioner also
4 complains that the prosecutor's argument that there was not blood on the fanny pack was not
5 supported by any evidence. (*Id.*) Petitioner claims that there was no evidence as to whether or
6 not there was blood on the fanny pack, and that there likely was blood on the fanny pack.

7 The trial transcript reveals that petitioner's wife was asked during direct examination
8 what petitioner was wearing when he was preparing to leave the house to go to the bank. (*See*
9 Dkt. 17, Ex. 24 at 64-65.) She replied that "He wore a bum bag, a fanny pack." (*Id.*, Ex. 24 at
10 65.) Another state's witness, Everett Police Detective Timothy O'Hara, was shown a series of
11 photographs during direct examination, two of which were relevant to the issue of the fanny
12 pack, and was asked to describe what he saw in those photographs. Detective O'Hara testified as
13 follows:

14 Q This is State's Exhibit 54. What do we see here?

15 A Off to the left, you're still in the entryway hallway there, but off to the left
16 is that family room. And these are the items that – this is how I found
17 them. There was a prescription bottle here, two prescription bottles here
18 and a black fanny pack type thing. That's the way I found it sitting there.

19 Q Okay. What's significant about that, if anything?

20 A Well, we found our defendant's ID in it, and it's the fanny pack that Mrs.
21 Marble said he was wearing during the incident.

22 Q Okay. That looks like a close-up of the same fanny pack.

23 A It is

Q Did you find any blood evidence on that fanny pack?

A I don't believe so, no.

1 Q And this is State's Exhibit 56. What do we see here?

2 A This was a wallet that was sitting directly on top of the fanny pack, opened
3 it up, and it's our defendant, Mr. Jeffrey Marble's driver's license.

4 (Dkt. 17, Ex. 25 at 191-92.)

5 During closing arguments, the prosecutor argued as follows:

6 What was his intent? This case really comes down to, what was he
intending to do? You can tell what his intent was in a few ways.

7 Caren⁷ told you when they were leaving the house that morning, he put on
8 a black fanny pack, the fanny pack that you saw in the pictures. Put it on to leave
the house when they were walking down the stairs. Where was the fanny pack in
9 those pictures? It was taken off. It was next to the living room.

10 What was significant about it? There's no blood on it. There's no blood
on the fanny pack. He wasn't wearing it when he was beating on her. He took
11 that fanny pack off and he put it down on the ground where he dropped it before
he attacked her, because he knew what he was going to do.

12
13 (*Id.*, Ex. 26 at 227-28.)

14 Petitioner complains that the prosecutor's argument that petitioner took the fanny pack off
15 and dropped it on the ground before attacking his wife was inconsistent with Detective O'Hara's
16 testimony that petitioner's wife said petitioner was wearing the fanny pack *during* the incident.
17 A review of the relevant testimony and argument, however, reveals that the prosecutor argued
18 reasonable inferences based on the evidence presented. Petitioner's wife testified that he was
19 wearing the fanny pack before the attack, and the fanny pack was found on the ground after the
20 attack. Petitioner's emphasis on Detective O'Hara's use of the word "during" in his testimony
21 regarding the relevance of the fanny pack does not render the prosecutor's argument false or

22 _____
23 ⁷ For reasons that aren't clear from the record, the prosecutor consistently referred to the victim, Catherine Dunne, as "Caren" throughout proceedings before the trial court.

1 improper.⁸ As to the prosecutor's comments regarding blood on the fanny pack, Detective
2 O'Hara's testimony that he didn't find any blood evidence on the fanny pack was sufficient to
3 permit the prosecutor to make the argument. The fact that the fanny pack was never actually
4 tested for blood does not render to prosecutor's argument in this regard improper.

5 b. Guns

6 Petitioner's wife testified on direct examination that petitioner owned guns, that he kept
7 his guns in his office at the bottom of the stairs, and that she thought petitioner was trying to
8 push her downstairs. (Dkt. 17, Ex. 24 at 56-57 and 64.) On redirect examination, petitioner's
9 wife testified that she felt petitioner's intent was to kill her because he tried to get her down the
10 stairs where his weapons were. (*Id.*, Ex. 24 at 99.) Everett Police Officer Karen White testified
11 that she spoke with petitioner's wife following the incident, and that petitioner's wife made the
12 following comments:

13 She said she thought that he was - - at the period when they were next to the
14 stairwell, she said that he was - - she felt he was trying to drag her downstairs to
15 kill her, and she thought she was going to die, and she didn't want her son to come
home and find her dead.

16 (*Id.*, Ex. 25 at 125-26.) Finally, Detective O'Hara testified that he saw guns in petitioner's office,
17 and that there were rifles and handguns laid out, apparently on the floor, between the desk and
18 the door to the office. (*See id.*, Ex. 25 at 211-12.)

19 During closing argument, the prosecutor argued as follows:

20 Let's look at what else tells us something about his intent. The guns.
21 Where were the guns? You heard Caren say that he had about six guns in the
22 house that she knew of. She doesn't know a whole lot about guns. She knew he
had some rifles, she new [sic] he had some pistols. Where were the guns found?

23 ⁸ Petitioner claims in his reply brief that the fanny pack was removed by an E.M.T. who was checking
petitioner for injuries after the attack, but no such evidence was presented at trial.

1 Downstairs in his home office where he works every day laid out on the floor.
2 Common sense tells you that's not how you store guns in a house. It's reasonable
to assume he's not storing them that way every day. Why are the guns out?

3 What did Caren tell you? Caren told you that when she was in the
4 hallway, he was slamming her against that railing that you saw separated that slate
floor from the stairs that led down to the guns. . . .

5

6 He couldn't get her downstairs where the guns were, his weapon of choice that
7 day was a barbell. . . .

8 (Dkt. 17, Ex. 26 at 228-229.)

9 The prosecutor's comments regarding the guns were clearly based on testimony provided
10 by state's witnesses at trial. Petitioner's assertion in his memorandum of points and authorities in
11 support of his petition, and in his reply brief, that the guns had nothing to do with the crimes is
12 contradicted by the record. (Dkt. 8, Memorandum of Points and Authorities at 19-20 and Dkt. 18
13 at 6.) The fact that guns were not used in the commission of the crime does not make them
14 irrelevant. The prosecutor's argument in this regard was not improper.

15 The Court of Appeals reasonably concluded that the prosecutor's comments about
16 petitioner's guns and fanny pack "expressed reasonable inferences from evidence presented at
17 trial." Accordingly, petitioner's federal habeas petition should be denied with respect to this
18 portion of petitioner's prosecutorial misconduct claim.

19 Certificate of Appealability

20 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
21 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
22 from a district or circuit judge. A certificate of appealability may issue only where a petitioner
23 has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §

1 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could
2 disagree with the district court's resolution of his constitutional claims or that jurists could
3 conclude the issues presented are adequate to deserve encouragement to proceed further."
4 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
5 petitioner is not entitled to a certificate of appealability with respect to any of the claims asserted
6 in his petition for writ of habeas corpus.

7 CONCLUSION

8 For the reasons set forth above, this Court recommends that petitioner's amended petition
9 for writ of habeas corpus be denied and that this action be dismissed with prejudice. This Court
10 further recommends that a certificate of appealability be denied with respect to all claims
11 asserted by petitioner in this action. A proposed order accompanies this Report and
12 Recommendation.

13 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
14 served upon all parties to this suit by no later than **September 18, 2015**. Failure to file
15 objections within the specified time may affect your right to appeal. Objections should be noted
16 for consideration on the District Judge's motion calendar for the third Friday after they are filed.
17 Responses to objections may be filed within **fourteen (14)** days after service of objections. If no
18 timely objections are filed, the matter will be ready for consideration by the District Judge on
19 **September 25, 2015**.

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1 This Report and Recommendation is not an appealable order. Thus, a notice of appeal
2 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the
3 assigned District Judge acts on this Report and Recommendation.

4 DATED this 28th day of August, 2015.

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6 JAMES P. DONOHUE
7 Chief United States Magistrate Judge
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